NO: 88-1669

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

BILL HAMILTON, MICHAEL NEEL GLEASON, and DAN M. LINKOUS

Petitioners,

V.

HONORABLE THOMAS J. STOVALL, PRESIDING JUDGE OF THE SECOND ADMINISTRATIVE JUDICIAL DISTRICT OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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On the Brief:
Nancy J. Gonzalez
Law Clerk

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INDEX OF AUTHORITIES	ii, iii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT AND AUTHORITIES	
THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTIRCT COURT'S SUA SPONTE DISMISSAL OF PETITIONERS' CASE ON THE GROUNDS OF LACK OF JURISDICTION	3
THE COURT OF APPEALS WAS WELL WITHIN ITS DISCRETION IN ASSESSING DOUBLE COSTS AGAINST THE PETITIONERS FOR FRIVOLOUS APPEAL	6
THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY DECLINING TO PUBLISH ITS OPINION	7
CONCLUSION	9
CERTIFICATE OF SERVICE	11

INDEX OF AUTHORITIES

Cases	Page
Hale v. Harney, 786 F.2 688 (5th Cir. 1986)	4
Beers v. North American Van Lines, Inc., 836 F.2d 910, 912 (5th Cir. 1988)	5
Bridge & Mfg. Co. v. Otoe County, 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623 (1987)	5
Feigler v. Tidex, Inc., 826 F.2d 1435 (5th Cir. 1987)	5
Save the Bay, Inc., v. United States Army, 639 F.2d 1100, 1102 (5th Cir. 1988)	6
Coghlan v. Starkey, 852 F.2d (5th Cir. 1988)	6
Atwood v. Union Carbide Corp., 847 F.2d 278 (5th Cir. 1988)	7
Opinions	
United States Court of Appeals for the Fifth Circuit, October 3, 1988, No. 87-6152	3
Statutes	
42 U.S.C. §1983 (1981)	2, 4
Rules	
Tex. R. Civ. P. Ann. R.18a(f) (Vernon 1988)	4

Fed. R. Civ. Pr. 12 (h)(3) 5

Fed. R. App. P. 38 6

U.S. Ct. Appeals - Fifth Circuit
Local Rule 47.5 8

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the district court's *sua sponte* dismissal of Petitioners' case on the grounds of lack of district court jurisdiction.

2. Whether the court of appeals abused its discretion in assessing double costs against the Petitioners for frivolous appeal.

3. Whether the court of appeals abused its discretion by declining to publish its opinion.

STATEMENT OF THE CASE

The Petitioners are involved in Texas state court domestic relations proceedings. Each of the Petitioners made a motion to recuse their presiding trial judge. Pursuant to the Texas Rules of Civil Procedure, the recusal motions were forwarded to the Honorable Thomas J. Stovall, the Respondent. After the recusal motions were denied, Petitioners filed suit against Judge Stovall seeking declaratory and injunctive relief in federal district court under 42 U.S.C. §1983(1981), alleging denial of due process. Petitioners claimed that Judge Stovall failed to provide them adequate notice of the hearings on their recusal motions. The district court abstained from any action, stating that state, and not federal court, was the appropriate forum for Petitioners' action. The request for a temporary restraining

order was denied and the case dismissed. Petitioners filed a timely notice of appeal.

In unpublished opinion No. 87-6152 rendered by the United States Court of Appeals for the Fifth Circuit on October 3, 1988, the Fifth Circuit affirmed the district court's dismissal, finding the district court lacked jurisdiction to hear the case. Additionally, the appeal was held to be frivolous, and double costs were assessed. It is this appellate decision from which the Petitioners complain in their Application for Writ of Certiorari now before this Court.

ARGUMENT AND AUTHORITIES

1. The court of appeals correctly affirmed the district court's sua sponte dismissal of Petitioners' case on grounds of lack of district court jurisdiction.

Petitioners argue the district court had jurisdiction over their claims present-

ed under 42 U.S.C. §1983 (1981), therefore the court of appeals erred in affirming the district court's dismissal of the case for want of jurisdiction.

If Petitioners had presented a deprivation of rights actionable under 42 U.S.C. §1983 (1981), federal district court jurisdiction might have been invoked. However, the only issue complained of by Petitioners was an alleged judicial error by the Texas state court. As the court of appeals correctly noted, review of Petitioners' alleged state court judicial error does not lie in federal court but can only be redressed through the state courts, and ultimately to the Supreme Court. See Tex. R. Civ. P. Ann. R. 18a(f) (Vernon 1988) and Hale v. Harney, 786 F.2d 688 (5th Cir. 1986).

Petitioners also complain that the district court could not dismiss the case sua sponte, particularly when the Defendant

had not yet been served with process. To the contrary, Fed. R. Civ. Pr. 12(h)(3) specifically provides for sua sponte dismissal for want of jurisdiction ... "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

When the federal district court determined it was without jurisdiction to hear Petitioners' complaint, it not only had the right, but also an obligation to dismiss the case on its own initiative. See Beers v. North American Van Lines, Inc. 836 F.2d 910, 912 (5th Cir. 1988) citing King from Bridge & Mfg. Co. v. Otoe County, 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623 (1987); Feigler v. Tidex, Inc., 826 F.2d 1435 (5th Cir. 1987); Save The Bay, Inc. v. United States Army, 639 F.2d 1100, 1102 (5th Cir. 1981).

2. The Court of Appeals did not abuse its discretion in assessing double costs against Petitioners for frivolous appeal.

It was well within the Court of Appeals' discretion to assess double costs against the Petitioners under Fed. R. App. P. 38. According to Rule 38, if a court of appeals determines an appeal is frivolous, it may award just damages and single or double costs to the appellee. The Fifth Circuit, as well as other circuits, have recently confirmed the viability of Rule 38 by assessing double costs in frivolous appeals. See Coghlan v. Starkey, 852 F.2d 806 (5th Cir. 1988).

The frivolity of Petitioners' appeal cannot be disputed. Because Petitioners had failed to allege a federal cause of action, the federal district court dismissed the case, clearly stating in its order that the case should have been brought in state court. That action alone

should have suggested to the Petitioners the futility of seeking a federal forum when no federal cause of action had been alleged. Nevertheless, in total disregard for the dictates of the court, the Petitioners sought appellate review.

The result of such review was obvious. Furthermore, as Petitioners' arguments of error were wholly without merit, the appeal was an unjustified consumption of appellate resources. The appeal was frivolous and worthy of double cost sanctions. See Atwood v. Union Carbide Corp., 847 F.2d 278 (5th Cir. 1988).

3. The court of appeals was well within its discretion by declining to publish its opinion.

Petitioners contend that the failure of the appellate court to publish its opinion was an abuse of discretion although no authority for this position is

cited in Petitioners' brief.

No need exists for the appellate decision to be published. Both parties were afforded copies of the opinion, which decision was based on the well-settled principle of federal subject matter jurisdiction. Local Rule 47.5 of the U.S. Court of Appeals for the Fifth Circuit provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession". The Fifth Circuit accordingly decided not to publish their opinion pursuant to that rule.

CONCLUSION

The court of appeals correctly affirmed the district court's *sua sponte* dismissal of Petitioners' case for want of district court jurisdiction. Petitioners alleged only a Texas state court error in the complaint filed with the federal district court. The federal court correctly recognized that it did not have jurisdiction over the case as such allegation was cognizable only in state court. As it was obligated to do by law, the federal court dismissed the case.

Dissatisfied with that result, Petitioners sought appellate review. As expected, the appellate court also found the case beyond district court jurisdiction and affirmed. Because the appeal was blatantly advanced in direct contravention with the firmly entrenched principle of federal jurisdiction, double

costs were assessed in accordance with well-established federal appellate practice.

Therefore, Respondent prays that Petitioners' Application for Writ of Certiorari be denied and for such other further relief as this Court may deem just and proper.

DATED: May 25, 1989

Respectfully submitted,

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CERTIFICATE OF SERVICE

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